Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES DESMOND TUCKER,

Petitioner,

v.

FRANK EDWARD FEARN and
JUDY FEARN

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether parents can recover loss of society damages for the death of their minor child in a wrongful death action brought under the general maritime law where the parents were not financially dependent on their minor child.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles Desmond Tucker, respectfully prays that a writ of certiorari issue to review the June 10, 2003, judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in the above-captioned proceeding.

OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit of June 10, 2003, styled *Charles Desmond Tucker v. Frank Edward Fearn and Judy Fearn*, and reported at 333 F.3d 1216 and reprinted at App. 1a. The July 16, 2002 decision of the district court, granting defendants' motion to strike plaintiff's claim for nonpecuniary damages, is unreported but is reprinted at App. 17a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit of June 10, 2003. The United States Supreme Court has jurisdiction to review decisions from the United States courts of appeals by virtue of 28 U.S.C. § 1254(1).

STATEMENT

This is an admiralty case in which Charles Desmond Tucker, the father of Charles Justin Tucker and the duly qualified Personal Representative of the Estate of Charles Justin Tucker, seeks both pecuniary and non-pecuniary damages for the wrongful death of his son due to the negligence of the defendants, Frank Edward Fearn and Judy Fearn. Charles Justin Tucker died as a result of injuries

received in a recreational boating collision which occurred in Alabama territorial waters on October 23, 1998.

On July 22, 2002 the District Court denied the Defendants' Motion for Summary Judgment and found triable issues of fact as to whether the Defendants violated their statutory duty under Rule 5 of the Inland Navigational Rules, 33 U.S.C. § 2005, to maintain a proper lookout and whether that failure was a contributory cause of the collision. On July 29, 2002 the District Court denied the Defendants' Motion to Reconsider the Denial of the Motion for Summary Judgment. However, the District Court struck from the pleadings the Petitioner's claim for non-pecuniary damages. The effect of the granting of this motion is that the only damages that the Petitioner can possibly recover for the wrongful death of his teenage son is $7,500.00 in funeral expenses.

Mr. Tucker thereafter perfected an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit. On June 10, 2003, the Court of Appeals affirmed. On August 15, 2003, the Court of Appeals denied the Petitioner's Petition for Rehearing and Petition for Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

While the issue presented to this Court is a narrow one, it calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred ...."). Whether loss of society damages for the death of a minor child are

recoverable by non-dependent parents is a question that has bedeviled the admiralty jurisprudence of the courts of appeals, as they have sought (as in the decision below) to reconcile the sometimes discordant authority of this Court in fashioning adequate remedies for wrongful deaths occurring within state territorial waters under the general maritime law.

THE AVAILABILITY OF AN ADEQUATE REMEDY IN THIS CASE IS COMPELLED BY THE PRECEDENTS OF THIS COURT

The Petitioner, Charles Desmond Tucker, respectfully submits that the availability of an adequate remedy in this case is compelled by a synthesis of precedents of this Court.

In *Moragne v. States Marine Lines*, 398 U.S. 375, (1970), the United States Supreme Court recognized a federal common law right of action for the wrongful death of non-seamen in state territorial waters.[1] In so holding, the United States Supreme Court overruled *The Harrisburg*, 119 U.S. 199 (1886), which had held that wrongful death causes of action are merely statutory and may not be created by judicial decree. In *Moragne*, this Court, at 398 U.S. 381, held that *The Harrisburg* amounted to "a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious

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[1] In *In Re Amtrak "Sunset Limited" Train Crash*, 121 F.3d. 1421 (11th Cir. 1997), the Eleventh Circuit held that the Alabama wrongful death statute, as interpreted by the Alabama Supreme Court, conflicts with fundamental principles of federal admiralty law insofar as it permits an award of punitive damages based on simple negligence and does not provide for the apportionment of fault.

enough to cause death."[2] In *Moragne,* this Court added, citing the *Sea Gull*, 21 Fed. Cas. 909 (No. 12, 578) (C.C. Md. 1865), "Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." 398 U.S. at 387

In the words of this Court in *Moragne*, the result of the lower courts' decisions in this case represents a striking departure from the result dictated by elementary principles in the law of remedies. If Justin Tucker had been injured by the Defendants' negligence, he could have recovered his full measure of damages. However, because he was killed by the Defendants' negligence, his parents are denied an adequate remedy and may only recover for his funeral expenses. Moreover, as will hereinafter be demonstrated, there are no established and inflexible rules which require the courts to withhold an adequate remedy where a child is killed through the negligence of the Defendants in state territorial waters.

In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), the United States Supreme Court set forth the parameters of the federal common law action established in *Moragne*. The Court began its analysis by noting that before the *Moragne* decision, wrongful death actions for deaths occurring on navigable waters within the three-mile territorial waters of a state depended on whether the state had enacted a wrongful death statute and, if so, whether the statute permitted recovery.[3] 414 U.S. at 576. The Court also noted that the *Moragne* decision reflected the Court's

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[2] However, *Moragne* did not address the specific remedies which are available under the federal common law right of action for wrongful death.

[3] This is the functional equivalent of what the lower courts have held in the case *sub judice*.

dissatisfaction with this state of the law that illogically and unjustifiably deprived the dependents of many maritime death victims of an "adequate" remedy for their losses. The Court went on to note that the *Moragne* decision ended this anomaly by creating a "*uniform*" federal cause of action for maritime wrongful-death designed to extend to the dependents of maritime wrongful-death victim's admiralty's special solicitude for welfare of those men who undertake to venture upon hazardous and unpredictable sea voyages, 414 U.S. at 577. The Supreme Court added that under *Moragne*, the maritime wrongful-death remedy is "not a statutory creation but judge-made." 414 U.S. at 583. The Court completed its contextual analysis at 414 U.S. at 583 by observing that the "shape of the new maritime wrongful-death remedy..." should "...be guided by the principle of maritime law that certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

This Court went on to identify the particular harms for which the maritime wrongful-death remedy permits recovery of damages. 414 U.S. at 583 et seq. Reviewing the *Death on the High Seas Act*, 46 U.S.C. 761 et seq, numerous state wrongful-death acts and the policies of maritime law, the Supreme Court concluded that under the maritime wrongful-death remedy, the decedent's dependents may recover damages for their loss of support, services, and society as well as funeral expenses. 414 U.S. at 584. The Court held that "the term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship and protection. Unquestionably, the deprivation of these benefits by wrongful death is a grave loss to decedent's dependents."

In a crucial passage in *Gaudet*, 414 U.S. at 585, n. 17, this Court went on to distinguish loss of society from mental anguish or grief, which is not recoverable. In this discussion, the Court noted that the loss of society, which is recoverable, focuses "...on more positive aspects of the injury, such as what would the decedent, had he lived, have contributed in terms of support, assistance, training, comfort, consortium, etc."[4] The Supreme Court went on to observe that its decision to permit recovery for loss of society aligned the maritime wrongful-death remedy with a majority of state wrongful-death statutes permit recovery for loss of society. 414 U.S. at 588. The Supreme Court concluded that "... in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."

LOWER COURT DECISIONS HAVE MISAPPLIED THIS COURT'S PRECEDENTS IN REJECTING LOSS OF SOCIETY DAMAGES FOR NONDEPENDENT PARENTS

As occurred in the decision below, see App. 7a-9a, lower courts relied heavily on the decisions of this Court in *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978) (hereinafter referred to as "*Higginbotham*") and *Miles v. Apex*

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[4] In *THE LAW OF ADMIRALTY*, SECOND EDITION (Foundation Press 1975) at p. 372, Grant Gilmore and Charles L. Black Jr. state that this footnote (No. 17) "may well be the least convincing footnote in the history of our jurisprudence". The Petitioner respectfully submits that this Petition for Certiorari presents the opportunity for this Court to reconsider the distinction which it drew in this footnote and allow damages for grief and loss of affection as well as loss of society in wrongful death cases under the general maritime law. However, it is not necessary for this Court to reconsider this distinction in order for Petitioner to prevail in his claim for loss of society damages.

Marine Corporation, 498 U.S. 19 (1990) (hereinafter referred to as "*Miles*"). The Petitioner respectfully submits that the lower courts have read *Higginbotham* and *Miles* too broadly and that their reliance thereon to deny plaintiffs such as Mr. Tucker an adequate remedy for the death of their son is misplaced.

The Eleventh Circuit Court of Appeals quoted from *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), as follows "*Gaudet* only applies in territorial waters, and it only applies to longshoremen." App. 9a (quoting 498 U.S. at 31). While it is certainly true that in *Miles v. Apex Corporation*, this Court made this statement, the Petitioner respectfully submits that the quoted sentence does not negate the precedential force of the decision of this Court in *Gaudet*. Mr. Gaudet was a longshoremen and the ruling in that case technically only applied to him.[5] However, this does not mean that *Gaudet* is not a persuasive precedent that cannot and should not be applied to those Plaintiffs who are not longshoremen.

Likewise, the results in *Higginbotham* were dictated by statute because the Death on the High Seas Act, 46 U.S.C. 761 et seq, at the time of the decision of this Court, expressly limited a decedent's survivors' recovery to "pecuniary loss".[6] However, since the *Higginbotham* decision, Congress has

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[5] In *Miles*, this Court stated at 498 U.S. 30: "There is also little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen."

[6] In *Miles*, this Court stated at 498 U.S. 31 regarding the *Higginbotham* decision: "Congress made the decision for us. DOSHA, by its terms, limits recoverable damages in wrongful death suits to "*pecuniary* loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C.App. § 762 (emphasis added). This explicit limitation forecloses recovery for non-pecuniary loss, such as loss of society, in a general maritime action."

added subsection (b) to § 762. Section 2 of DOSHA, 46 U.S.C. § 762, now provides:

> "(b)(1) If the death resulted from a commercial aviation accident occurring on high seas beyond 12 nautical miles from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, additional compensation for nonpecuniary damages for wrongful death of decedent is recoverable. Punitive damages are not recoverable.
>
> (2) In this subsection, the term 'nonpecuniary damages' means damages for loss of care, comfort, and companionship."

In any event, this Court in *Higginbotham*, stated at 436 U.S. 622:

> In *Moragne* the Court left various subsidiary questions concerning the nonstatutory death remedy—such as the schedule of beneficiaries and the limitations period--for "further sifting through the lower courts in future litigation." *Id.*, at 408, 90 S.Ct., at 1972. A few years later, in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, the Court confronted some of these questions. Among the issues addressed in *Gaudet* was the measure of survivors' damages. The Court held that awards could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish or grief. *Id.*, at 583-591, 94 S.Ct., at 814-818. The Court recognized that

> DOSHA, which compensates only for pecuniary losses, did not allow awards for loss of society. But the accident in *Gaudet*, like that in *Moragne*, took place in territorial waters, where DOSHA does not apply. The Court chose not to adopt DOSHA's pecuniary-loss standard; instead it followed the "clear majority of States" and "the humanitarian policy of the maritime law," both of which favored recovery for loss of society. 414_U.S., at 587-588, 94 S.Ct., at 816. In sum, the Court made a policy determination in *Gaudet* which differed from the choice made by Congress when it enacted the Death on the High Seas Act.

In *Miles* this Court held that the parent of a seaman who died from injuries incurred aboard the respondents' vessel could not recover loss of society damages under the Jones Act, 46 U.S.C. § 688, or the general maritime law. The Petitioner respectfully submits that this Court's holding in *Miles* was also driven by statute. This Court noted that the Jones Act makes applicable to seamen the substantive recovery provisions the Federal Employers' Liability Act of the (FELA).[7] 45 U.S.C. § § 51-59. This Court also noted that the FELA had been consistently interpreted as providing recovery for only pecuniary losses. 498 U.S. at 32. This Court reasoned that since Congress incorporated the FELA

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[7] This Court noted at 498 U.S. at 29 that: "... The Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under the FELA." The Petitioner respectfully submits that like workers compensation schemes generally, the special protections afforded seaman have brought about trade-offs which balance the certainty of recovery with limitations upon the employer's ultimate exposure.

unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well because it is presumed that Congress is aware of existing law when it passes legislation.

Therefore, the Court held that the Jones Act precludes recovery for loss of society damages. This Court went on to note at 498 U.S. 32-33 that the seamen's parent could not recover loss of society damages on her unseaworthiness claim because it would be inconsistent with the Supreme Court's place in the constitutional scheme were the Court to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting in negligence. However, in *Miles* this Court previously noted at 498 U.S. 27 that:

> "In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions."

This Court in *Miles* also referred at 498 U.S. 27 to "the constitutionally based principle that federal admiralty law should be a system of laws coextensive with, and operating uniformly in, the whole country'", citing *Moragne*.

In *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199, 116 S.Ct.619, 133 L.Ed. 2d 578 (1996), this Court affirmed a ruling of the lower courts that allowed the parents of a twelve-year-old child who was killed in a jet ski accident to seek to recover damages for the loss of society under *Moragne*. In *Yamaha Motor Corporation*, this Court borrowed the applicable state wrongful death statute which was not in conflict with fundamental principles of federal admiralty law. This Court held at 516 U.S. 213-214:

> *Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies. The decision recalled that " 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'"... Our understanding of *Moragne* accords with that of the Third Circuit, which Judge Becker set out as follows: "*Moragne* ... showed no hostility to concurrent application of state wrongful death statutes. Indeed, to read into *Moragne* the idea that it was placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical. The *Moragne* cause of action was in many respects a gap-filling measure to ensure that seamen (and their survivors) would all be treated alike. The 'humane and liberal' purpose underlying the general maritime remedy of *Moragne* was driven by the idea that survivors of seamen killed in state territorial waters should not have been barred from recovery simply because the tort system of the particular state in which a seaman died did not incorporate special maritime doctrines. It is difficult to see how

> this purpose can be taken as an intent to preclude the operation of state laws that do supply a remedy.

This Court added at 516 U.S. 215:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided. See *Miles,* 498 U.S., at 30-36, 111 S.Ct. at 324-328 (Jones Act, rather than general maritime law, determines damages recoverable in action for wrongful death of seamen); *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 232, 106 S.Ct. 2485, 2499, 91 L.Ed.2d 174 (1986) (DOSHA, which limits damages to pecuniary losses, may not be supplemented by nonpecuniary damages under a state wrongful-death statute); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 624-625, 98 S.Ct. 2010, 2014-2015, 56 L.Ed.2d 581 (1978) (DOSHA precludes damages for loss of society under general maritime law.) But Congress has not prescribed remedies for the wrongful death of nonseafarers in territorial water.

The last decision of this Court in the line of cases that bear on the legal issue raised by this writ application is *Norfolk Shipbuilding and Drydock Corporation v. Garris*, 532 U.S. 811 (2001). In *Norfolk*, this Court held that the negligent breach of a maritime duty of care is actionable

when it causes death, as it is when it causes injury.[8] In reaching this conclusion, this Court reviewed three statutes – the Jones Act, DOSHA, and the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. 901 et seq. – to determine whether they precluded the Respondent's negligence action. This Court held that they did not. As to the Jones Act, this Court held at 532 U.S. 817-818: "Respondent's son, who was not a seaman, was not covered by the Jones Act, and we have held that the Jones Act bears *no implication* for actions brought by nonseamen." (emphasis supplied) As to DOSHA, this Court held at 532 U.S. 818: "...No intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be appropriate to effectuate the policies of general maritime law." This Court added at 532 U.S. 820:

> Even beyond the express pre-emptive reach of federal maritime statutes, however, we have acknowledged that they contain a further prudential effect. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field... Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to

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[8] This Court noted that since *Moragne's* facts were limited to the duty of seaworthiness the issue of whether there is a wrongful death action for negligence has remained technically open. However, this Court found no rational basis for distinguishing between negligence and seaworthiness.

> Congress. The cause of action we recognize today, however, is new only in the most technical sense. The general maritime law has recognized the tort of negligence for more than a century, and it has been clear since *Moragne* that breaches of a maritime duty are actionable when they cause death, as when they cause injury. Congress's occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents.

Petitioner respectfully submits that the general maritime law has recognized the availability of an adequate remedy for wrongful death since *Moragne* was decided in 1970 and has recognized that loss of society damages are an integral part of this adequate remedy since *Gaudet* was decided in 1974. As in *Norfolk*, Congress's occupation of this field is not so extensive as to preclude this Court from recognizing what is logically compelled by this Court's precedents – that parents of minor children who are killed because of negligence that occurs in territorial waters have an adequate remedy for their losses.

THERE IS A SPLIT IN THE DECISIONS OF THE CIRCUIT COURTS ON THE LEGAL ISSUE PRESENTED BY THISPETITION

As noted in the decision of the Eleventh Circuit in the case s*ub judice*, App. 12a, there is a split in the decisions of the circuit courts on the legal issue presented by this petition. In *Wahlstrom v. Kawasaki Heavy Industry*, 4 F. 3d. 1084 (2nd Cir. 1993), *Anderson vs. Whittaker Corporation*, 894 F. 2d. 804 (6th Cir. 1990) and *Miles vs. Melrose*, 882 F.2d 976 (5th Cir. 1989), aff'd sub nom on other grounds, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed. 2d 275,

the courts held that nondependent survivors may not recover loss of society damages in wrongful death actions for a nonseaman's death in territorial waters. However, in the subsequent decision of *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994) the Fifth Circuit observed at 903 that the jurisprudence on this point was a "tangled skein of case law" and held that children of a deceased parent who were not financially dependant on the parent might be able to recover loss of society damages in the Fifth Circuit. See also the Fifth Circuit's affirmance without opinion at 114 F.3d 1184 (5th Cir. 1997) of the District Court's decision in *Blome v. Aerospatiale Helicopter Corporation*, 924 F. Supp. 805 (S.D. Tex. 1996).

Moreover, in *Sutton v. Earles*, 26 F. 3d 903 (9th Cir. 1994) the Court rejected the contention that the *Gaudet* remedy for loss of society is only recoverable by dependents and affirmed a damage award in favor of the parents of a deceased child who did not prove that they were financially dependent on the child. The Court held, in pertinent part:

> Against this background, the district court in the present case awarded the parents of the decedents substantial damages for loss of society. The reasons for doing so are straightforward and, in our view, justifiable.
>
> *Gaudet* itself authorizes recovery for loss of society in cases of wrongful death in a state's territorial waters. It is true that DOHSA and the Jones Act would not permit an award of such non-pecuniary damages, but DOHSA does not apply because the death was not on the high seas (beyond the three-mile limit), and the Jones Act does not apply because the decedents were not seamen…The government,

however, would derive a different rule from the pattern of statutes and precedent. It contends that parents may not recover damages for loss of society unless they prove that they were dependent on their deceased child. … The government also relies on the emphasis on uniformity that pervades both *Higginbotham* and *Miles*, as well as the statement in *Miles* that "an admiralty court should look primarily to [state and federal] legislative enactments for policy guidance." *Miles*, 498 U.S. at 27, 111 S.Ct. at 323. From these pronouncements, the government extracts a rule that, in the interest of uniformity between DOHSA and Jones Act on the one hand and the law applicable to territorial waters on the other, would permit recovery for loss of society only to parents who were dependent upon their decedents. We are not convinced by the government's reasoning. The footnote in *Higginbotham* is indicated in a sentence of text that makes the Supreme Court's position clear: It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute. *Higginbotham*, 436 U.S. at 624, 98 S.Ct. at 2014. (footnote omitted). It is clear enough from this statement in *Higginbotham* that the Court left the law applicable to territorial-water *Moragne* actions where it found it. Its limitation of recovery under DOHSA was simply dictated by Congress, resulting in non-uniformity. …Thus, the results in *Higginbotham* and *Miles* were clearly dictated

by statute, and neither statute limits the damages recoverable for death in territorial waters that were authorized by *Gaudet*. We also do not consider controlling the Supreme Court's use of the word "dependents" at various points in *Gaudet*. Cf. *Wahlstrom*, 4 F. 3d 1084 (noting instances). We view these references merely as descriptive of the parties before the court in that case, not as a restriction on the Court's holding that loss-of-society damages are available in *Moragne* action. The *Gaudet* Court simply was not faced with the precise issue before us today, which in our view is whether these parents are proper *Moragne* Plaintiffs, entitled to recover the usual elements of damages available to such Plaintiffs. ...We also do not consider controlling the statement in *Miles* that '[t]he holding of *Gaudet* ... applies only to longshoremen.' 498 U.S. at 31, 111 S.Ct. at 325. The point that the Court was making was that *Gaudet* does not apply to seamen. As the Court earlier recognized, '*Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen.' *Id.* At 30, 111 S.Ct. at 324. Indeed, the government concedes that the rule of *Gaudet* is not confined to longshoremen when it agrees that *dependent* parents may recover loss-of-society damages in *Moragne* actions. We decline, therefore, to limit *Gaudet* by drawing an unnecessary distinction between dependent and nondependent parent Plaintiffs in *Moragne* actions for determining the availability of loss-of-society damages. As the Court noted in *Moragne*, "it better

> becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."...

26 F.3d at 915-17.

The Petitioner respectfully submits that the decision in *Sutton v. Earles*, supra, represents the correct approach to deciding the legal issue raised by this petition. As in the case *sub judice*, it better becomes the humane and liberal character of this proceeding in admiralty to give, rather than withhold, the remedy sought. To withhold non-pecuniary damages in this case would be a denial of justice to the Petitioner and would be inconsistent with this Court's rulings in *Moragne and Gaudet*.

Nevertheless, the courts below found the reasoning in *Miles v. Melrose*, 882 F. 2d 976 (5th Cir. 1989) and *Anderson v. Whitaker Corp.*, 894 F. 2d 804 (6th Cir. 1990), to be persuasive. These cases held that in order to recover for loss of society, the Plaintiff must have been financially dependent on the person who was killed. The cases also held that a denial of recovery for loss of society would lend more uniformity to admiralty jurisdiction because the Death on the High Seas Act (DOSHA), 46 U.S.C. § 761 et seq, limits recovery to pecuniary losses, and because survivors cannot recover for loss of society under the Jones Act, 46 U.S.C. § 688.

The Petitioner respectfully disagrees with the reasoning of *Miles v. Melrose*, supra, and *Anderson v. Whitaker Corp*, supra, and the lower courts' reliance thereon. The lower courts' reliance on the need for uniformity between statutory and non-statutory causes of action reflects a

misconception of the uniformity sought to be achieved by this Court's decisions from *Moragne* to *Yamaha Motor Corp.* The desirability of uniformity in the maritime law has its roots in the view, as expressed in Justice Frankfurther's concurring opinion in *Wilburn Boat Co., v. Fireman's Fund Insurance Company, Inc.*, 348 U.S. 310 (1955), that the shipping industry should not be subjected to liabilities which differ from state to state as vessels move from one port to another. Petitioner submits that this need for uniformity is inapposite to the question as to whether non-statutory maritime causes of action should be uniform with statutory maritime causes of action. It is likewise Petitioner's position that this need for uniformity has little or no application in cases such as this case which involve recreational boating accidents and do not directly involve interstate or foreign commerce. See Robert Force, "Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou," 21 *Tul. Mar. L.J.* 7 (1996); Robert Force, "Tort Reform by the Judiciary: Developments in the Law of Maritime Personal Injury and Death Damages," 23 *Tul. Mar. L.J.* 351 (1999).

DENIAL OF AN ADEQUATE REMEDY IN THIS CASE REPRESENTS A STRIKING DEPARTURE FROM ELEMENTARY PRINCIPLES OF THE LAW OF REMEDIES

Petitioner respectfully submits that denial of an adequate remedy in this case represents a striking departure from elementary principles of the general maritime law of remedies, a result which this Court found offensive in *Moragne.*

Alabama law is unique to the extent that it does not provide for compensatory damages.[9] Rather, it is more

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[9] Alabama law does not prohibit an award of compensatory

generous to plaintiffs in that it provides for punitive damages upon a showing of simple negligence.[10] It is therefore entirely appropriate and necessary, the Petitioner respectfully submits, that the Alabama statutory remedy for wrongful death be supplemented with a judge-made remedy as a gap-filling measure in order to achieve the uniform vindication of the maritime law. See *Miles*, 498 U.S. at 31 ("*Moragne* involved gap filling in an area left open by statute; supplementation was entirely appropriate."). Such supplementation would comport with sound maritime policy for several reasons.

In the first place, it makes no sense for a plaintiff to be able to recover an adequate remedy for the maritime wrongful death of his child if the death occurs one (1) foot east of the Florida/Alabama line but to not be able to recover an adequate remedy if the death occurs one (1) foot west of the line. In *Gaudet*, the United States Supreme Court noted that in *Moragne* the United States Supreme Court created a "*uniform*" federal common law cause of action for maritime wrongful death. In *American Dredging Company v. Lambert*, 81 F.3d 127 (11th Cir. 1996), the Eleventh Circuit held that non-pecuniary damages for the maritime wrongful death of non-seamen can be recovered if the accident occurs in navigable waters situated in the State of Florida. However, in the case *sub judice*, the lower courts have held that if a maritime wrongful death occurs in navigable waters which

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damages but merely provides that a plaintiff's remedy is in punitive damages.

[10] The Respondents in the case sub judice claimed below that since Eleventh Circuit had held *In Re Amtrack "Sunset Limited" Train Crash,* supra, that the Alabama wrongful death statute does conflict with fundamental principles of federal admiralty law, the Petitioner is left with no adequate remedy for compensatory damages. This claim, if accepted by this Court, would effectively revive the rule of law of the *Harrisburg*, at least in the State of Alabama.

are situated in the State of Alabama the parents of a minor child who is killed may not recover non-pecuniary damages. The Petitioner respectfully submits that this anomaly conflicts with the teachings of the United States Supreme Court in *Gaudet* and *Calhoun* that *Moragne* created a "*uniform*" federal common law action for maritime wrongful death.

It thus appears that the decision of the Eleventh Circuit in the case sub judice runs squarely against the current of the Supreme Court's jurisprudence. Any ostensible reliance on "uniformity" – in the sense of giving non-seamen survivors the same remedies as those of mariners – is clearly diminished in view of the fact that Congress has not prescribed a uniform rule (as it could, and has, with DOSHA). See *Sutton v. Earles,* supra, at 916-17 (9th Cir. 1994):

> "We do not consider ourselves free to give such weight to the interest of uniformity, in light of *Gaudet's* explicit acknowledgment that it was creating a non-uniform category of damages in territorial water, Gaudet, 414 U.S. at 588 n. 22, and the acknowledgments of non-uniformity in *Higginbotham*, 436 U.S. at 624. The fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute, *Miles*, 498 U.S. at 32-33, and that statute does not limit recoveries for the deaths of non-seamen." (citations omitted).

The Eleventh Circuit has thus, in the guise of judicially determining a uniform rule of the general maritime law, in fact acted contrary to the direction of the Supreme Court.

Moreover, this case implicates important policies of maritime law including the promotion of safety on inland waterways, the accountability of negligent boat operators, the necessity and desirability of providing an adequate make-whole restitutionary remedy to the parents of children killed on inland waterways, and the interest of the State of Alabama in preventing homicides. Moreover, it makes no sense to be able to recover an adequate remedy for personal injury but not for death. Nevertheless, the decisions of the lower courts do not comport with ordinary notions of justice because they effectively relieve tortfeasors of the consequences of their negligent actions and deny parents an adequate remedy for the wrongful death of their beloved teenage son.

The uniformity of remedies among the states is an important goal, as has been recognized by several decisions of this Court. The Petitioner respectfully submits that the policy need for uniformity as between statutory and non-statutory remedies is less important. In any event, uniformity for uniformity's sake should not be the ultimate goal of the law. Rather, justice should be the ultimate goal. Nevertheless, the rule of law that has been adopted in this case by the lower courts represents a striking departure from elementary principles of the general maritime law of remedies.

Petitioner, Charles Desmond Tucker, respectfully concludes that the legal issue presented by this Petition for Certiorari is of fundamental importance to maritime law and policy and should be considered and decided by this Court.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

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